

3 State Contractors, Inc. and United Steelworkers of America, Local 14034, AFL-CIO-CLC. Case 6-CA-23363

March 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 17, 1991, Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, 3 State Contractors, Inc., Cecil, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ At one point in his decision, the judge inadvertently states that the Union, on April 1, 1990, sent to the Respondent a second appeal of the overtime grievance. The correct date of that appeal is April 1, 1991.

Joann F. Dempler, Esq., for the General Counsel.

Donald J. Balsley Jr., Esq., of Pittsburgh, Pennsylvania, for the Respondent.

Charles F. Leonard, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on July 18, 1991. The charge was filed on February 8, 1991,¹ and the complaint was issued April 22, 1991. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing since October 1, 1990, to process two grievances and repudiating the grievance provisions of its collective-bargaining agreement with United Steelworkers of

¹ The charge names Local 4034 rather than 14034 as the Charging Party and identifies Local 4304 as the majority representative of Respondent's employees. The mistake in number seems clearly inadvertent but in any event would not invalidate the charge which may be filed by anyone. Likewise misidentification of the bargaining representative is not fatal. A charge is not a pleading but need only be sufficient to initiate an investigation. *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17-18 (1943). The charge in this case satisfied that purpose.

America and its Local 14034 (Union).² Respondent denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged as a contractor in the building and construction industry with an office and place of business in Cecil, Pennsylvania. It annually performs services valued in excess of \$50,000 outside of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act³ and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Union is the recognized collective-bargaining representative for a unit of Respondent's production and maintenance employees, and has a collective-bargaining agreement with Respondent effective by its terms from January 1, 1990, to December 31, 1994. The agreement was negotiated by Union Representative Charles Leonard and Respondent's senior construction superintendent Charles Nippert.

Article V of the collective-bargaining agreement sets forth the contractual grievance procedure. In outline, it provides for successive steps starting with discussion between the employee and the superintendent. If no satisfactory resolution is reached, a written grievance may be filed to be answered by the superintendent within 48 hours, followed by appeal within 10 days for discussion between a representative of the Union and a company official. If the grievance remains unresolved, it may be appealed to an impartial arbitrator. For suspension and discharge cases, article VII of the agreement imposes an additional requirement that, "Any complaint arising under Article must be appealed to the Company in writing within forty-eight (48) hours after such suspension or discharge or the particular case will be considered closed."

² At the hearing counsel for the General Counsel moved to amend the complaint to allege that Respondent's senior construction superintendent Nippert and president Monaco were supervisors within the meaning of the Act and/or agents of Respondent. The motion is granted, and the evidence supports the allegations of the amendment.

³ Respondent in its answer admitted the jurisdictional allegations of the complaint including the allegation that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. In its brief Respondent contends that the Board lacks jurisdiction because the record contains no evidence as to the "commerce" affected by the alleged unfair labor practices or as to how such unfair labor practices affect, burden, or obstruct interstate commerce. I find that the admitted allegations of pars. 2 and 3 of the complaint establish both that Respondent is engaged in interstate commerce and that it meets the Board's standards for the assertion of jurisdiction. Even assuming that Respondent remains free to challenge the conclusionary allegations of par. 4 of the complaint, the facts admitted in pars. 2 and 3 support the conclusion alleged in par. 4. *NLRB v. Reliance Fuel Corp.*, 371 U.S. 224 (1963); *Siemens Mailing Service*, 122 NLRB 81 (1958); 29 U.S.C. § 164(c).

In April 1990,⁴ a group of employees asked their steward to file a grievance over the way their overtime pay had been computed for work performed during the week of Good Friday. On April 20, Steward Dennis Ford prepared a written grievance with the assistance of Union Representative Leonard and presented it to the foreman on the job. The grievance asserted that Respondent had violated the overtime provisions of the contract by failing to pay overtime wages for hours worked in excess of eight on a regular workday. The job foreman replied that Respondent would not pay overtime wages for less than 40 hours worked in the workweek.

A few days later Ford told Leonard that the grievance had been denied, and on April 25, Leonard wrote Nippert appealing the grievance to the next step of the grievance procedure.

After receiving the appeal, Nippert arranged for a lunch meeting between Leonard, himself, and Michael Monaco, president of Respondent, whom Leonard had not previously met. At that meeting there was some discussion of the overtime grievance, and Monaco gave Leonard a letter explaining how overtime payments were computed for the week in question and why the Respondent believed that the payments complied with the requirements of the collective-bargaining agreement. Thereafter, on May 18 a second meeting was held at Leonard's office attended by Leonard, Ford, Monaco, and Nippert to discuss the grievance and another problem relating to mileage. Ford brought with him a brief written statement explaining the Union's position on the overtime computation. At the end of the meeting the grievance remained unresolved.

On May 21, Leonard wrote Nippert as follows:

As all attempts to resolve grievance 1-90 have failed and following our discussions (held in my office on 5/18/90), this letter will serve as an appeal of grievance 1-90 to arbitration. I have enclosed biographical sketches of five arbitrators listed with the Federal Mediation and Conciliation Service, any one is satisfactory to the union. If they are not acceptable please submit your own list.

In the balance of the letter Leonard set forth a four point proposal, "As a final gesture to attempt to resolve this issue." The letter concluded, "If this offer is not satisfactory, proceed with the choosing of an arbitrator.

Leonard received no reply to the May 21 letter, and on June 11 sent a further letter to Nippert as follows:

On May 21, 1990, I sent you correspondence concerning the outstanding grievance. To date, I have not received a reply.

I have enclosed copies of everything sent in the previous correspondence in order that there will be no opportunity for error.

Please respond within a reasonable amount of time—failing to do so will leave no other alternative but to seek legal enforcement of the collective-bargaining agreement.

Again Leonard received no response. On July 12 Union Counsel Milasich wrote Nippert asserting that Respondent had a legal obligation to arbitrate the issues raised by the

grievance and that "unless within ten days of receipt of this letter the Company notifies the USWA of its willingness to arbitrate Grievance 1-90, the USWA will commence litigation to compel the Company to arbitrate that grievance and to reimburse the USWA for its attorneys fees."

In the meantime, toward the end of June another grievance was filed. On Thursday, June 21, Gary McKenzie, a jobsite foreman, told employee James Flaherty that he would have to work overtime. Flaherty replied that he could not work overtime because of a personal problem. McKenzie refused to permit him to leave, telling him that if he did not work overtime, he would not have a job to return to. Flaherty left.

The next day, Flaherty spoke to Leonard about filing a grievance. Leonard told him that the foreman did not have authority to fire him.⁵ Leonard advised him to report back to work on Monday and to see Nippert, telling him that if he was going to be discharged, Nippert would have to do it.⁶

When Flaherty reported to work on the following Monday, June 25, Nippert confirmed that Flaherty no longer had a job and told him that he should file a grievance if he wanted to. Flaherty went back to Leonard who immediately wrote a grievance. Flaherty took it back to the steward who signed and filed it that day. On June 26 Foreman McKenzie denied the grievance, and on July 6 Leonard wrote Nippert appealing the grievance to the next step of the grievance procedure, asking him to set a time and place for a meeting to discuss the grievance. Leonard received no response to his July 6 letter and on July 23 sent Nippert a further letter stating that legal action also would be taken on the Flaherty grievance in accord with union counsel's July 12 letter.

On July 24, Monaco replied by letter to Union Counsel Milasich's July 12 letter. In the final paragraphs Monaco wrote:

Mr. Milasich, your letter has been welcomed since this situation has been exaggerated and at this point in time I am bewildered as to our next required action. I can not decipher whether I am to arbitrate, answer the May 20, 1990 letter as to contract changes, or specifically address the letter dated May 14, 1990 by Mr. Denis Ford. I am willing to discuss this with you if you desire. I have no desire to spend the funds for arbitration on this particular item, I feel this is not necessary if we can open proper lines of communication with the interested parties and resolve this problem. I have attempted to describe our frustration in answering a grievance which on the surface is quite clear but has been changed, expanded, modified and finally is apparently being forced into arbitration.

Your cooperation and assistance in this matter would be appreciated.

On July 30, Monaco responded to Leonard's July 23 letter. Monaco took issue with the Union's version of the facts relating to the Flaherty grievance, asserting that Flaherty had quit and was not discharged. Monaco also asserted that Leonard had failed to establish an adequate working relation-

⁵Nippert testified that McKenzie had authority to fire Flaherty with Nippert's approval.

⁶Leonard testified that in advising Flaherty he decided that the time limit for filing a grievance would not begin to run until Nippert discharged Flaherty.

⁴All dates are in 1990 unless otherwise indicated.

ship with Respondent and its employees. Monaco indicated his willingness to discuss the matter further with union counsel and proposed that the Union agree to eliminate the Flaherty grievance based on a determination by the state employment security agency that Flaherty had quit voluntarily.

On August 3, Leonard wrote Monaco stating that Leonard and not union counsel was the appropriate person with whom Monaco should meet, reiterating the Union's position that Flaherty had been discharged and had not quit, and stating that he would call to set up a meeting to smooth out relations between Respondent and the Union as Monaco had indicated that he desired.

On August 7 Leonard and Monaco met, with Flaherty present, to discuss outstanding issues between them. After some discussion of the composition of the grievance committee, Monaco said that he would not arbitrate the Flaherty grievance and that it was his right to deny arbitration. Leonard attempted to explain that it was not up to Monaco to approve or deny arbitration, and that either party had the right to take a grievance to arbitration. However, Monaco continued to insist that he was not going to arbitration because the grievance had no merit and Flaherty had voluntarily quit.⁷

Immediately after this meeting, Leonard sent the following letter dated August 7 to Monaco relating to the Flaherty grievance.

Please be advised, in accordance with Article V-Adjustment of Grievances of the Collective-Bargaining Agreement between 3-State Contractors, and the United Steelworkers of America, the union hereby appeals Grievance #3-90 to the third step of the grievance procedure; i.e., arbitration.

I have enclosed biographical sketches of arbitrators that are acceptable to the union.

Please advise me of your acceptance of one of these, or supply me with a list that is acceptable to you, so I may review them.

Leonard received no response and on September 11 sent the following letter to the Federal Mediation and Conciliation Service:

I have enclosed a request for a panel of arbitrators for use in three disputes between the parties.

Although the company's position is that these disputes are not arbitrable, they do agree that the union may request a panel from the FMCS.

It is not clear at this time whether the company will participate in the procedure. What is clear is the union is requesting a panel and intends to proceed accordingly.

⁷From Flaherty's presence at the meeting it seems clear that the Flaherty grievance was discussed, and from the testimony of Leonard and Flaherty it is also clear that despite the fact that the Union had not yet appealed the grievance to arbitration, Monaco stated that he would not arbitrate the grievance. Although Leonard testified that Monaco stated generally that he would decide whether grievances had merit and that he would make the decision if a grievance would go to arbitration, Flaherty tied the discussion to his grievance, and there is no indication in the testimony of either that arbitration of the overtime grievance was discussed during this meeting. Monaco did not testify.

It is our intention to arbitrate all three issues with one arbitrator, that is the reason we are requesting only one panel.

If you have any questions, please call me at (412) 921-9100.

After receiving a panel from the Mediation Service, on October 1, 1990, Leonard wrote Monaco as follows:

In a communication dated September 20, 1990, you received a list of arbitrators from the Federal Mediation and Conciliation Service.

In accordance with Article V of the Collective Bargaining Agreement between the United Steelworkers of America and 3-State Contractors the parties shall select an arbitrator from the panel submitted.

Please inform me at the earliest possible date when we may meet to choose an arbitrator.

Leonard received no response to his October 1 letter. At an unemployment compensation hearing on January 3, 1991, Leonard asked Monaco and Respondent's attorney when Respondent was going to respond to the list of arbitrators and what they were going to do about it. He received no answer. Leonard filed the charge in this case a month later.

On April 1, 1991, Leonard sent a letter to Monaco appealing a grievance pertaining to mileage to arbitration. On the same day he sent an identical letter pertaining to the overtime grievance. Leonard testified that the letter pertaining to the mileage grievance was filed when he discovered that there had been no prior request to arbitrate that grievance and that he did not know why he also sent a letter pertaining to the overtime grievance at the same time. Respondent did not reply to either letter.

B. Concluding Findings

1. The issues

The complaint alleges that since on or about October 1, 1990, Respondent has failed and refused to process the overtime and Flaherty grievances, has thereby repudiated article V of the collective-bargaining agreement, and has failed and refused to comply with all the terms of the agreement in violation of Section 8(a)(1) and (5) and (d) of the Act.

The contentions and briefs of the parties raise several issues.

1. Did Respondent have a contractual obligation to arbitrate the overtime and Flaherty grievances?

2. Did Respondent have a contractual obligation to participate in the selection of an arbitrator?

3. Did the Union fail to comply with procedural requirements of the grievance procedure, and if so, did its failure relieve Respondent of any obligation to arbitrate the grievances?

4. Did Respondent fail or refuse to arbitrate the overtime and Flaherty grievances and thereby unilaterally change the terms of the collective-bargaining agreement?

5. If so, was Respondent's failure or refusal to arbitrate within the 10(b) period?

2. Respondent's contractual obligation to arbitrate

The grievance procedure set forth in the collective-bargaining agreement by its terms applies to disagreements "as to the meaning and application of or compliance with" the provisions of the agreement. Any timely appeal of a suspension or discharge also may be processed as a grievance under the grievance procedure. Thus, unless relieved from its obligation by the factors relied on by Respondent, Respondent was obligated by the collective-bargaining agreement to arbitrate the overtime and Flaherty grievances.

3. Respondent's obligation to join in selecting an arbitrator

Counsel for the General Counsel contends that after the Federal Mediation and Conciliation Service (FMCS) sent a list of arbitrators to the parties, Respondent was obligated in response to Leonard's October 1 letter to meet with the Union to select an arbitrator. Respondent contends that it had no obligation to participate in the selection of an arbitrator and that the Union could have selected an arbitrator from the FMCS list without Respondent's participation and could have proceeded to binding arbitration before an arbitrator unilaterally selected by the Union. Respondent relies on the provisions of the agreement, statements made in Leonard's letter to the FMCS, and the testimony of Nippert and Leonard as to their understandings of the agreement. I find that none of these support Respondent's position.

Article V, section 2, step 3 of the agreement provides:

If the grievance is not settled in Step 2, it may be appealed by either party to an Impartial Arbitrator to be appointed by mutual agreement by the parties hereto within ten (10) days following receipt by either party of a written request for such appointment. If the parties cannot agree upon an appointment of an Impartial Arbitrator within the said period, he shall be selected by the parties from a panel of five (5) submitted by the Director of Federal Mediation and Conciliation Service. The decision of the Arbitrator shall be final. An Arbitrator to whom any grievance shall be submitted shall be authorized only to interpret and apply the provisions of the Agreement insofar as shall be necessary to the determining of such grievance, but he shall not have authority to alter in any way the provisions of this Agreement. The expenses and salaries incident to the service of the Arbitrator shall be shared equally by the Company and the Union.

It is agreed by the parties hereto that procedure provided in the Article, if followed in good faith by both parties, is adequate for fair and expeditious settlement of any grievance. Both parties mutually agree that grievances to be considered must be filed promptly after the occurrence thereof. Grievances not appealed as set forth above shall be considered settled on the basis of the decision last made and shall not be eligible for further discussion or appeal.

The agreement provides that the arbitrator "shall be selected by the parties" from the FMCS panel. The agreement contains no procedure to be followed in making that selection and no method for resolving any deadlock if the parties

are unable to agree on a selection. However, nothing in the agreement confers on either party the right to make a unilateral selection binding on the other party. While Respondent suggests the contrary, the use of the word "shall" in the second sentence of step 3 of the grievance procedure is commonly understood as requiring action by the named actors, i.e., both parties.⁸

Leonard's letter to the FMCS discloses no contrary understanding. In stating that the Company had agreed that the Union might request a panel, Leonard did not indicate any understanding that Respondent would not object to a unilateral selection of an arbitrator from the FMCS list, and nothing in the remainder of the letter supports an inference that he had such an understanding. Leonard's testimony also supports no such inference.

While Nippert testified that he understood that the agreement permitted one party alone to select an arbitrator whose award would be binding on both parties, his testimony was not unqualified. Significantly, he added that the agreement would be satisfied if one party made the selection and the other did not object. Thus, even Nippert understood the agreement to require the acquiescence of the other party. Nothing in the record would support a finding that Respondent's silence in response to Leonard's letters amounted to acquiescence. If Respondent's intent was to acquiesce, it was incumbent on Respondent to state its acquiescence affirmatively.

I find that Respondent was obliged to participate in selecting an arbitrator from the FMCS list and that its contention to the contrary is an afterthought, raised for the first time at the hearing in this case.

4. The Union's compliance with procedural requirements

Respondent contends that in processing each of the grievances the Union failed to comply with requirements of the grievance procedure and that Respondent was therefore not required to arbitrate either grievance.

In the case of the Flaherty grievance, Respondent contends that even if Flaherty was discharged and did not quit, the discharge occurred on Thursday, June 21, and nothing prevented him from filing his grievance within 48 hours from the time of the discharge. Therefore, Respondent contends that his grievance was untimely under the 48-hour rule set forth in the contract. While these contentions raise valid issues of fact and contract interpretation, they are issues for the arbitrator and they do not relieve Respondent of the obligation to arbitrate. *John Wiley & Sons v. Livingstone*, 376 U.S. 543 (1964); *Teamsters Local 765 v. Stroemmann Bros.*, 625 F.2d 1092 (3d Cir. 1980).

With respect to the overtime grievance, Respondent contends that Leonard's May 21 letter was a notice of appeal to step 2 of the grievance procedure which was not sent within 10 days after the step one disposition of the grievance, that it was not sent to Respondent's offices at Cecil, Pennsylvania, and that the appeal to arbitration was not perfected until 11 months after the appeal to the second step of the grievance procedure and after the charge was filed. The facts do not support two of these contentions and the third

⁸ *The American Heritage Dictionary of the English Language, New College Edition*, Houghton Mifflin Company (1976) p. 1189.

involves no breach of a procedural requirement. The May 21 letter was an appeal to step 3 of the grievance procedure and not to step 2, as is clear from its face. Leonard sent the letter to Nippert's home address where he had sent other correspondence. Nothing in the agreement requires that notices be served only at the Company's office address, and there is no evidence that Respondent ever objected to use of Nippert's home address. Finally, the redundant appeal to arbitration sent on April 1, 1990, does not render defective the original notice of appeal sent on May 21, 1990, less than a month after the appeal to the second step. These objections fail even to raise issues for the arbitrator and must be rejected as afterthoughts and makeweights in the attempt to justify Respondent's position.

5. The alleged unilateral change

In *GAF Corp.*, 265 NLRB 1361, 1364-1365 (1982), the Board stated:

[W]here there is a collective-bargaining agreement containing a grievance/arbitration clause, an employer's refusal to take all, or even most, grievances to arbitration constitutes an 8(a)(5) violation. *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980); *Independent Stave Company, Diversified Industries Division*, 233 NLRB 1202 (1977); *Airport Limousine Service, Inc.*, and *Jay McNeill, Esq. as Receiver for Airport Limousine Service, Inc.*, 231 NLRB 932 (1977). However, a refusal to arbitrate one type of grievance is not necessarily an unfair labor practice. Where an employer refuses to arbitrate a very narrow, specifically defined grievance subject matter, the Board has not found a violation of the Act. *Whiting Roll Up Door Mfg. Corp.*, 257 NLRB 734 (1981); *Central Illinois Public Service Company*, 139 NLRB 1407 (1962); *Airport Limousine*, *supra*, at 934.

In deciding whether refusals to arbitrate violate the Act, the ultimate question is whether the employer by its conduct has unilaterally modified contractual terms or conditions of employment during the effective period of the contract. *Southwestern Electric*, 274 NLRB 922, 926 (1985).

The overtime and Flaherty grievances were not of the same kind or class, and the evidence provides no basis for concluding that Respondent's refusal to arbitrate was narrowly grounded. Only two common reasons have been advanced for not arbitrating the two grievances. One, that the Union failed to adhere to contractual grievances procedures, as found above does not apply to the overtime grievance and was clearly an afterthought.⁹ The other appears in Nippert's testimony that Respondent had no need to go to arbitration

because it had complied with the contract and that in a future situation if the facts established in his mind that they had complied with the contract there would be no need to go to arbitration. This testimony echoes Monaco's statements at his August 7 meeting with Leonard and Flaherty. Together they support the inference that Respondent failed to participate in the selection of an arbitrator after receiving the Union's October 1 letter because it arrogated to itself the determination as to which grievances should be arbitrated, contrary to the terms of the grievance procedure. I find that Respondent's failure to respond to the Union's requests to participate in the selection of an arbitrator was deliberate, was in effect a refusal to arbitrate the grievances, and unilaterally changed the terms of the collective-bargaining agreement by imposing a noncontractual condition that Respondent would arbitrate only those grievances that it decided should go to arbitration.

6. The 10(b) issue

The final issue to be considered is whether the violation occurred during the 6-month period preceding the filing and service of the charge or occurred before that time and therefore is barred by Section 10(b) of the Act. Respondent contends that the complaint is barred by Section 10(b) because the violation if any must depend on the statements attributed to Monaco at the August 7 meeting with Leonard and Flaherty.

Both Leonard and Flaherty testified that at that meeting Monaco stated that he would not arbitrate Flaherty's grievance and that it was his right to deny arbitration. Monaco was not called as a witness. Flaherty portrayed the discussion of arbitration as tied to his grievance. Leonard portrayed Monaco's statements more broadly, testifying that he said that he was the one who would decide whether grievances had merit and whether they would go to arbitration. Neither indicated in their testimony that at this meeting there was any discussion of the overtime grievance or of the Union's request to arbitrate that grievance.

As of August 7 the Union had not yet appealed the Flaherty grievance to arbitration, and it had not yet requested a list of arbitrators from the FMCS with respect to the overtime grievance, the next step provided on failure to mutually agree on an arbitrator as requested in the May 21 letter.

In order to find that the violation had occurred by August 7 it is necessary to find that by that date Respondent had refused to go to arbitration, not only over a single grievance or a narrow class, but over all grievances which Monaco did not think should be arbitrated, and had clearly and unequivocally repudiated the arbitration provisions of the contract. *GAF Corp.*, *supra*; *A & L Underground*, 302 NLRB 467 (1991).

I find that Monaco's August 7 statement considered in conjunction with the other communications up to that date was not sufficient to meet that test. Monaco's July 24 reply to union counsel's letter states that he did not want to arbitrate the overtime grievance, but not that he would refuse to do so. In that letter Monaco expressed interest in discussing it further and stated that he was somewhat confused as to whether the Union was then seeking arbitration or settlement of that grievance. Monaco's statements at the August 7 meeting were made in the context of discussion of the Flaherty grievance for which arbitration had not yet been requested. At most at that meeting Monaco indicated that he would not

⁹At the hearing Respondent advanced as an additional reason for not arbitrating the overtime grievance that it was moot because the overtime had been paid. While Steward Dennis Ford conceded that overtime rates had been paid for all time worked in excess of 40 hours during the week in question, the grievance complained that Respondent had not paid the employees at overtime rates for time worked in excess of 8 hours on each day of that week. Ford's recollection at the time of the hearing was concededly weak as to what he had been paid. But there is no concession in his testimony nor was any evidence offered by Respondent to show that the employees had been paid for all daily overtime as sought in the grievance.

agree to arbitrate the Flaherty grievance for three reasons, at least one of which was narrow and pertained only to that grievance—that Flaherty had quit. Given the context of the discussion, the absence of any request to arbitrate the Flaherty grievance at that point, and the mixed grounds given for refusing to arbitrate it, I find that there was at that point no clear and unequivocal general refusal to arbitrate grievances that Monaco decided should not be arbitrated.

Following the August 7 meeting, Leonard requested arbitration of the Flaherty grievance, and on September 11 wrote to request a panel of arbitrators from the FMCS. After receiving the list, on October 1 Leonard wrote Monaco to seek a date for a meeting to select an arbitrator from the list. Respondent did not respond to that letter. As Respondent had a duty to participate in the selection of an arbitrator, it had a duty to respond to the letter and meet with the Union to select an arbitrator. At that point it became clear that Respondent would not arbitrate either grievance and was repudiating its agreement to arbitrate. Since the charge was served on February 11, 1991, the violation occurred within the 10(b) period. While the August 7 meeting occurred outside the 10(b) period, statements made by Monaco at the time may be relied on “to shed light on the true character of matters occurring within the limitations period.” *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 416 (1960). Here the statements are not relied on to establish the violation but only to shed light on the reasons for Respondent’s failure to participate in the selection of an arbitrator in October.

CONCLUSIONS OF LAW

1. At all times material the Union has been the exclusive collective-bargaining representative of Respondent’s employees in the appropriate unit described below for the purposes of collective bargaining within the meaning of Section 9(a) and (b) of the Act.

2. All production and maintenance employees, excluding supervisors, office and clerical employees, draftsmen, technical employees, and guards, employed by Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. By unilaterally repudiating and modifying the arbitration provisions of its collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, 3 State Contractors, Inc., Cecil, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America and its Local 14034 as the exclusive representative of the employees in the appropriate bargaining unit by unilaterally repudiating and/or modifying the terms and conditions of the collective-bargaining agreement with the above-named Union with respect to the arbitration of disputes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) On request, promptly participate in the selection of an arbitrator for the grievances filed with respect to overtime work dated April 20, 1990, and with respect to the termination of James Flaherty dated June 25, 1990, and proceed to their arbitration in accord with article V of the collective-bargaining agreement between Respondent and the Union.

(b) Post at its facility in Cecil, Pennsylvania, copies of the attached notice marked “Appendix.”¹¹ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹¹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America and its Local 14034 as the exclusive representative of our production and maintenance employees by unilaterally repudiating and/or modifying the terms and conditions of the collective-bargaining agreement with the above-named Union with respect to the arbitration of disputes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, promptly participate in the selection of an arbitrator for the grievances filed with respect to overtime work dated April 20, 1990, and with respect to the termination of James Flaherty dated June 25, 1990, and proceed

to their arbitration in accord with article V of our collective-bargaining agreement with the Union.

3 STATE CONTRACTORS, INC.